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Fulloop Sdn Bhd v Crest Builder Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-97–01 OF 2013
LEE HENG CHEONG JC
24 SEPTEMBER 2013

Banking — Banks and Banking Business — Guarantee and indemnity — Performance bond — Appointment of subcontractor for development project — Parties entered into agreement and conditions of building subcontract — Issuance of performance bond — Application to prevent demand over performance bond — Prevention from releasing payment payable under performance bond — Prevention from receiving payment — Whether there was basis to make wrongful demand on performance bond

The first defendant had appointed the plaintiff as the subcontractor for a development project and subsequently, the plaintiff and the defendant entered into the agreement and conditions of building subcontract ('the said agreement'). Pursuant to the said agreement, the plaintiff caused the second defendant to issue a performance bond/bank guarantee in favour of the first defendant. The first defendant did not make full payment to the plaintiff for the sums certified and as a result, the plaintiff issued a demand for payments in arrears to the first defendant for the sum of RM1,807,553.42. However, the plaintiff received a complaint by the first defendant via a letter that the former's performance in the said project was unsatisfactory. The plaintiff then replied to the first defendant demanding the latter to withdraw the said letter immediately and refrain from making such allegation in the future. The defendant did not respond. Veritas Architects ('the architect') then instructed the first defendant to make payment but the latter did not do so. In the present application, the plaintiff sought to prevent the first defendant from making a demand over a performance bond issued by the plaintiff in favour of the first defendant; to prevent the second defendant from releasing payment payable under the said performance bond to the first defendant; and to prevent the first defendant from receiving payment from the second defendant pursuant to the said performance bond. The plaintiff contended that the said letter would give the first defendant a basis to make wrongful demand on the performance bond.

Held, allowing the plaintiff's application and dismissing the first defendant's application:

(1) There was no whatsoever basis for the first defendant to issue the said letter which was issued right after the architect instructed the first defendant to make payment to the plaintiff. The issuance of the said

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letter was mala fide and that it was a real threat from the first defendant to use the said letter, to make a call on the said performance bond. Further the said letter contended that the plaintiff's performance was unsatisfactory and below minimum expectation, which in the circumstances of the case, was not correct. This would constitute the very basis upon which the first defendant could utilise, to make demand on the performance bond (see paras 21–22).

(2) This was a case where the court should grant the injunctive reliefs sought by the plaintiff due to the unconscionable conduct of the first defendant and that the balance of convenience was in favour of the plaintiff for this court, to grant the injunctive reliefs sought by the plaintiff. Further the injunctive reliefs granted would not prejudice or adversely affect the said performance bond, they would merely postpone the realisation of the said performance bond until the plaintiff was given the opportunity to prove his case (see para 30).

[Bahasa Malaysia summary

Defendan pertama telah melantik plaintif sebagai subkontraktor untuk pembangunan projek dan kemudiannya, plaintif dan defendan memasuki perjanjian dan syarat-syarat subkontrak bangunan ('perjanjian tersebut'). Berikutan kepada perjanjian tersebut, plaintif menyebabkan defendan kedua untuk mengeluarkan bon prestasi/jaminan bank memihak defendan pertama. Defendan pertama tidak membuat bayaran penuh kepada plaintif untuk jumlah yang disahkan dan akibatnya, plaintif mengeluarkan tuntutan bayaran kepada defendan pertama untuk sejumlah RM1,807,553.42. Plaintif walau bagaimanapun menerima aduan oleh defendan pertama melalui surat bahawa prestasi plaintif dalam projek tersebut tidak memuaskan. Plaintif kemudiannya menjawab kepada defendan pertama menuntut defendan pertama untuk menarik balik surat tersebut dengan segera dan berhenti daripada membuat tuduhan tersebut pada masa akan datang. Defendan tidak menjawab. Veritas Architects ('arkitek') kemudiannya mengarahkan defendan pertama untuk membuat bayaran tetapi defendan pertama tidak berbuat sedemikian. Dalam permohonan ini, plaintif memohon untuk menghalang defendan pertama daripada membuat tuntutan ke atas bon prestasi yang dikeluarkan oleh plaintif memihak defendan pertama; untuk menghalang defendan kedua daripada membayar bayaran yang kena dibayar di bawah bon prestasi tersebut kepada defendan pertama; dan untuk menghalang defendan pertama daripada menerima bayaran daripada defendan kedua berikutan bon prestasi tersebut, plaintif berhujah bahawa surat tersebut akan memberikan defendan pertama asas untuk tuntutan salah atas bon prestasi tersebut.

Diputuskan, membenarkan permohonan plaintif dan menolak permohonan defendan pertama:

(1) Tiada langsung asas untuk defendan pertama mengeluarkan surat

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tersebut yang mana dikeluarkan sebaik sahaja artiket tersebut mengarahkan defendan pertama membuat bayaran kepada plaintif. Pengeluaran surat tersebut adalah mala fide dan bahawa ia adalah ancaman betul daripada defendan pertama untuk menggunakan surat tersebut, untuk membuat rujukan kepada bon prestasi tersebut. Selanjutnya surat tersebut menghujahkan bahawa prestasi plaintif tidak memuaskan hati dan di bawah harapan minima, yang mana dalam keadaan kes ini, tidak betul. Ini akan membentuk asas utama di mana defendan pertama dapat menggunakannya untuk membuat tuntutan ke atas bon prestasi tersebut (lihat perenggan 21–22).

(2) Ini adalah kes di mana mahkamah patut memberikan relief injunktif yang dipohon oleh plaintif akibat tingkah laku tidak berhati perut defendan pertama dan bahawa imbangan kebarangkalian memihak plaintif untuk mahkamah ini memberikan relief yang dipohon oleh plaintif. Selanjutnya relief injunktif yang diberikan tidak akan memprejudiskan atau menjejaskan bon prestasi tersebut, ia hanya akan menangguhkan penduitan bon prestasi tersebut sehingga plaintif diberi peluang untuk membuktikan kesnya (lihat perenggan 30).]

Cases referred to

Kejuteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442, CA (refd)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (folld)

Yip Fook Thai (Ng Joo Bun with him) (Yip & Co) for the plaintiff.
CH So (Siti Ruhaila Ariffin with him) (CH So & Associates) for the first defendant.

Lee Heng Cheong JC:

BACKGROUND

[1] The plaintiff's application in the *notis permohonan* against the first defendant, in essence, is to:

(a) prevent the first defendant to make a demand on the performance bond issued by the plaintiff in favour of the first defendant;

(b) prevent the second defendant to release payment payable under the said performance bond to the first defendant on the said performance bond; and

(c) prevent the first defendant, from receiving payment from the second defendant pursuant to the said performance bond.

[2] The second defendant has received the writ summons, statement of

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claim, the notice of application and its supporting affidavit (para 4 of the *affidavit penyampaian* affirmed by Hamizan bin A Rahim on 6 February 2013). However, the second defendant takes no part in defending itself.

[3] This is the inter partes hearing for an injunction by the plaintiff and the hearing of the first defendant's application to set aside the ex parte injunction order dated 30 January 2013.

[4] The first defendant appointed the plaintiff as sub contractor for a development project known as 'Cadangan Pembangunan 1 Blok Menara Pejabat 35 Tingkat Yang Mengandungi 4 Tingkat Tempat Letak Kereta Aras bawah Tanah B1-B4, 4 Tingkat Podium Tempat Letak Kereta Aras Tanah P1-P4, 29 Tingkat Pejabat Beserta 2 Tingkat Ruang Rekreasi (Kolam Renang, Gim, Surau, Ruang Penjaja, dan Kafeteria) Tingkat Bawah, Mezanin, Tingkat 5-32, 2 Tingkat Unit Penthouse — Tingkat 33-34 dan Sebuah Pencawang TNB di Tingkat Bawah di Atas Lot 166 (Premis No 175) Jalan Ampang, Seksyen 63, Dalam Bandaraya Kuala Lumpur Untuk Tetuan Khor Joo Saik Sdn Bhd - Letter of Acceptance for Supply, Delivery, installations, Testing and Commissioning of Electrical (High & Low Voltage) services, Standby Generator Services, Telephone Services and Extra Low Voltage Services (PA, Fireman intercom, CCTV & Card Access)', vide a letter of acceptance dated 18 January 2010.

[5] Clause 2.1 of the letter of appointment provides as follows:

> The Contract shall be based on the Agreement and Conditions of Building Sub-Contract (Private Edition), Edition 1998, Revised October 1998 published by Pertubuhan Arkitek Malaysia subject to amendments, amplifications and supplementary clauses that were set out in the tender documents.

[6] Pursuant to cl 2.1 of the said letter of appointment, the plaintiff and the first defendant entered into the agreement and conditions of Building Sub-Contract (Private Edition) Edition 1988.

[7] Pursuant to the said agreement between the plaintiff and the first defendant, the plaintiff caused the second defendant to issue a performance bond/bank guarantee dated 16 March 2010 in favour of the first defendant.

[8] The certificate of completion and compliance was issued by Veritas architects, the Architect in charge of the said project, on 14 August 2012.

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THE PLAINTIFF'S CASE

[9] The plaintiff contends that the consultant in charge of the project, CKP Nizaruddin Jurukur Bahan Sdn Bhd had issued notification of payment to nominated subcontractor, namely the plaintiff for payments to be paid by the first defendant to the plaintiff.

[10] The first defendant did not make full payment to the plaintiff for the sums certified. As a result, the plaintiff issued a demand for payments in arrears to the first defendant demanding for the sum of RM1,807,553.42.

[11] On 16 January 2013, the plaintiff received a letter dated 29 December 2012 from the first defendant, by way of ordinary post. In the said letter, the first defendant contends that the plaintiff's overall performance in the said project, was unsatisfactory and below minimum expectation. The said letter was issued about six months after the issuance of the said certificate of completion and compliance. In the said letter, the first defendant stated that 'we shall continue to monitor your performance in the said project and also in other projects you are currently working on, if any'.

[12] The plaintiff then replied to the first defendant's said letter dated 29 December 2012, vide their letter dated 23 January 2013 ('exh YKH7') demanding that the first defendant withdrew their said letter dated 29 December 2012 immediately and refrain from making such allegation on the future but there was no response at all from the first defendant.

[13] On 31 December 2012, Veritas Architects instructed the first defendant to make payment to the said project's nominated sub contractor, including the plaintiff, not later than 7 January 2013 and also to furnish proofs of payment by the same date. Despite the said instructions from the said architect, the first defendant did not make payment to nominated subcontractors, including the plaintiff. On 14 January 2013, Veritas Architects gave a notice to the first defendant. In the said notice, it clearly stated that:

> In accordance to the provisions of Clause 27.4 of the Condition of Contract, we hereby request you to furnish proof that the following certified amount due to the NSC has been fully discharged
>
> (a) RM1,807,553.42 as per Fullop Sdn Bhd (the plaintiff)'s letter ref no L0451301002 dated 8.1.2013.
>
> (b) ...

[14] In the said letter dated 14 January 2013, Veritas Architects also stated as follows:

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> Please be informed that if you fail to comply with this final request, we shall certify accordingly, following which, the employer may make payment of such certified amount due and remaining unpaid to the NSC concerned and deduct the same from any sums due to or become due to yourselves.

[15] Despite the said letter dated 14 January 2013 from Veritas Architects, the first defendant still failed to furnish evidence of payments to Veritas Architects who then issued a letter dated 16 January 2013 to the first defendant, exercising their rights to certify that the amounts certified as due to the plaintiff, which remains unpaid.

[16] It was under such circumstances that the plaintiff contends that the first defendant issued the said letter dated 9 December 2012 that the plaintiff's work is not satisfactory and below minimum expectation.

[17] The performance bond was issued by the second defendant is to guarantee the due performance of the contract of the said project, to be performed by the plaintiff.

[18] Despite that the certificate of completion and compliance was issued on 14 August 2012, the defendant still sent the said letter dated 29 December 2012 to the plaintiff, complaining that the plaintiff's performance is unsatisfactory and below minimum expectation. The plaintiff contends that the said letter dated 29 December 2012 would give the first defendant, a basis to make wrongful demand on the said performance bond.

CONSIDERATION OF THE TWO APPLICATIONS

[19] The first defendant contends, inter alia, that the plaintiff did not regard exh 'YKH8' as a threat to call on the bank guarantee as there was nothing in the said exh 'YKH8', to show that the plaintiff was threatened by the first defendant's said letter. This court finds that there is no merit in the first defendant's aforesaid contention as the plaintiff's exh 'YKH8' clearly demanded that the first defendant withdraw their said letter dated 29 December 2012, immediately and refrain from making such allegations. The plaintiff's said response in exh 'YKH8', to the court's mind, showed that the plaintiff was, at the very least, extremely concerned if not, threatened by the first defendant's said letter. Further this court finds that the first defendant's non-response to exh 'YKH8' certainly would heighten the plaintiff's extreme concern and/or fear.

[20] The first defendant further contended that their said letter dated 29 December 2012, was also issued to their other sub contractors and pursuant to the ISO procedure of the first defendant which is a subsidiary of a public listed

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company. This court finds that as the certificate of completion and compliance of the said project was issued on 14 August 2012, six months before the first defendant's said letter dated 29 December 2012, thus this letter would be out of place and irrelevant. Thus the plaintiff, in the court's view, was justified forming the view that the first defendant's act in issuing the said letter, with an ulterior mala fide motive because the said certificate of completion and compliance of the said project was issued on 14 August 2012 and why was the first defendant, making such mala fide and irrelevant complaints. This is further compounded by the fact that the first defendant failed to respond to the plaintiff's letter dated 23 January 2013 (exh 'YKH7') and clarified the matter.

[21] This court finds that there is no whatsoever basis for the first defendant to issue the said letter dated 29 December 2012 which was issued right after the architect instructed the first defendant to make payment to the plaintiff for the amount of money which the first defendant had received from the employer of the project since 30 October 2012.

[22] In the circumstances of the case, this court finds that the issuance of the said letter dated 9 December 2012, was mala fide and that it is a real threat from the first defendant to use the said letter dated 9 December 2012, to make a call on the said performance bond. Further the said letter dated 29 December 2012 contends that the plaintiff's performance is unsatisfactory and below minimum expectation, which in the circumstances of the case, is not correct. This would constitute the very basis upon which the first defendant can utilise, to make demand on the said performance bond. Paragraph 1 of the said performance bond state that 'if the sub contractor shall in any respect fail to execute the subcontract or commit any breach of his obligation thereinunder. Then the guarantor shall pay to the main contractor RM872,500'.

[23] This court is guided by the decision of the Federal Court case of *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1, where the Federal Court at p 10, held:

> The Court of Appeal used the following tests and principles in coming to its conclusion, in determining the issue at hand as found in the following passages from its judgment:
>
> (i) The principle concerning 'unconscionability' was initially propounded by Lord Denning in the case of *Lloyds Band v Bundy* [1975] QB 326 where it was held that unconscionable transaction between parties may be set aside by the court of equity. This 'unconscionable' category is said to extend to all cases where unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker (see also *Halsbury's Laws of England,* (3rd Ed), Vol 17 [1956] at p 682.
>
> (ii) On an application for relief against unconscionable conduct, the court looks to the conduct of the party attempting to enforce, or retain benefit

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of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so (see *Commercial Bank of Australia Ltd v Amadio and Another* (1983) 46 ALR 402).

(iii) In the Singapore High court, Lai Kew Chai J in the case of *Min Thai Holdings Pte Ltd v Suniable Pte Ltd & Anor* [1999] 2 SLR 368 opined that the concept of unconscionability involves unfairness, as distinct from dishonesty or fraud, or conduct so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party.

(iv) It is not possible to define 'unconscionability'other that to give some very broad indications such as lack of bona fides. *What kind of situation would constitute 'unconscionability'would have to depend on the facts of each case.* This is a question which the court has to consider on each occasion where its jurisdiction is invoked. There is no pre-determined categorisation (see *Dauphine Offshore Engineering and Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khadifa bin Zayed Al-Nahyan* [2000] 1 SLR (R) 117; and *Shanghai Electrical Group Co Ltd v PT Merak Enengi Indonesia* [2010] 2 SLR 329).

(v) Based on the above considerations, we are of the view that *these is no simple formula that would enable the court to ascertain whether a party had acted unconscionably in making a call on an on-demand performance bond or bank guarantee. In the final analysis, whether or not 'unconscionability' has been made out is largely dependent on the facts of each case. In every case where 'unconscionability' is made out, there would always be an element of unfairness or some form of conduct which appears to be performed in bad faith.*

(vi) In *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR (R) 262, the Singapore Court of Appeal, stated that 'a *higher degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in the interlocutory proceedings. It is clear that mere allegations are insufficient*'. (Emphasis added.)

[24] In the same case and at p 14, the Federal Court had this to say:

In *LEC Contractors (M) Sdn Bhd* the Court of Appeal took a different position. It found that only fraud which must be pleaded, can be an exception. In that case it was held that:

A mere allegation of fraud is not sufficient. Fraud must be specifically pleaded and proved. In the instant case, not only fraud was not specifically pleaded in the pleadings but also the instances of fraud submitted in the submission were clearly not instances of fraud but dispute between parties. Although it is clear from the authorities, the dispute must be settled and it would affect the performance bond, *but unconscionable conduct or bad faith by itself is not fraud.* What is more important to justify any injunction to stop payment is that there must be clear evidence of fraud on the part of the first defendant which comes to the knowledge of the second defendant. As the second defendant has no knowledge of any fraud or that fraud was

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given to its notice, it had no choice but to honour the performance bond and meet the demand of the first defendant.

(Emphasis added.)

[25] At p 16, the Federal Court went on and said:

We are also in agreement with Mohamed Ariff bin Md Yusof JC in the case of *Focal Asia Sdn Bhd* when he expressed this opinion on these two exceptions and the test to be applied:

> If there is clear evidence of fraud in the underlying contract, or unconscionability, the court can interfere. In these two situations, the integrity and autonomy of the document will not be compromised, since the paying bank will not be directly prevented from acting on the document. It is the beneficiary that is prevented from making a call on the document on these grounds. *Nonetheless, the evidence allowing intervention by the court must be clear. I accept the test of 'seriously arguable that the only realistic inference is fraud' as good law in an interlocutory application such as the present.*
>
> (Emphasis added.)

[26] At p 17, the Federal Court further opined:

We are of the considered view that the 'seriously arguable and realistic inference' test as used by the learned judicial commissioner in *Focal Asia* is equally applicable to the extended exception of unconscionability. That test therefore needs to be applied to the relevant material facts before the court. The same test which results in a 'strong prima facie case' was utilised by the Court of Appeal at the intermediate appeal stage. And the Court of Appeal said this of the required burden now rested on the shoulder of Sumatec:

> As in the case of fraud, to establish 'unconscionability' *there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion.* Hence, the respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of 'unsonscionability' which would *basically mean establishing a strong prima facie case.* In other words, the respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, *not necessarily beyond reasonable doubt,* that a case of 'unconscionability' being committed by the beneficiary (the appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. *This additional ground of 'unconscionability' should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.*
>
> (Emphasis added.)

[27] Then at pp 17 and 18, the Federal Court went on to discuss the case of *Kejuteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd &*

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Anor [2011] 7 CLJ 442 and said:

(i) In my view, consonant with the principle as laid by my learned brother unconscionability is a doctrine which allows courts to deny enforcement of a contract because of abuses arising out of the contract.

(ii) In my view the principle underlying the unconscionability doctrine is the prevention of oppression and unfair conduct; and because *the determination of unconscionability is fact specific, courts must consider such a claim on a case by case basis and assess the totality of the circumstances.*

(iii) A distinction must be drawn between an injunction to restrain a bank/issuer from making payment out on a performance bond (which is governed by the performance guarantee agreement) and an injunction to restrain a beneficiary from making demand on the bond (which is governed by the underlying contract between the parties).

(iv) All the facts and circumstances surrounding the demands made by the first respondent on both the performance bonds were so lacking in good faith and amounted to unconscionable conduct that it warranted court intervention by way of injunction to avoid injustice. The demands on the bonds were premature, invalid and of no effect.

(v) *A determination on whether unconscionability applies in a particular case would therefore depends largely on the material facts*. Concidentally, the same learned appeal judge wrote the lead judgment in *Kindenko* and in this case. The injunction was allowed in *Kindenko* and refused in this case. Particular case would therefore depends largely on the material facts. (Emphasis added.)

[28] Thus this court finds that the fear and threat faced by the plaintiff that the first defendant will use the said letter dated 29 December 2012, is real and reasonable and it would be unconscionable for the first defendant, to utilise the said letter to make a call on the said performance bond notwithstanding that the first defendant is fully aware that the said letter was issued about six months after the issuance of the said certificate of completion and compliance.

[29] This court finds that there are serious questions to be tried namely:

(a) whether the issuance of the said letter dated 29 December 2012 from the first defendant that the plaintiff received on 16 January 2013 is bona fide and/or conscionable?;

(b) whether there is any basis for the first defendant to issue the said letter dated 29 December 2012?;

(c) whether the plaintiff's perceived fear or threat that the first defendant will use the said letter dated 29 December 2012 to make demand on the said performance bond is reasonable?;

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(d) whether this court or arbitration is the proper forum to decide on the reliefs sought by the plaintiff?;

(e) whether the first defendant can ignore the various notifications issued by the consultant and not to make payment to the plaintiff?;

(f) whether any attempt by the first defendant to make demand on the said performance bond is a fraudulent or unconscionable?.

[30] From the circumstances of the instant case, this court finds that this is a case where the court should grant the injunctive reliefs sought by the plaintiff due to the unconscionable conduct of the first defendant and that the balance of convenience is in favour of the plaintiff for this court, to grant the injunctive reliefs sought by the plaintiff. Further the injunctive reliefs granted would not prejudice or adversely affect the said performance bond, they merely postpones the realisation of the said performance bond until the plaintiff is given the opportunity to prove his case.

ORDER

[31] In the light of my above findings, I find that there are merits in the plaintiff's application and accordingly grant an inter parte injunction in favour of the plaintiff and dismiss the first defendant's application to set aside the ex parte injunction granted.

Plaintiff's application allowed and first defendant's application dismissed.

Reported by Afiq Mohamad Noor